Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1493

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS K. SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

v.

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KATHLEEN A. SULLIVAN*
MINNA J. KOTKIN
BLS LEGAL SERVICES CORP.
Federal Litigation Program
One Boerum Place
Brooklyn, New York 11201
(718) 780-7994

ELLEN SAIDEMAN
HERBERT SEMMEL
New York Lawyers
for the Public Interest, Inc.
135 East 15th Street
New York, New York 10003
(212) 777-7707

Attorneys for Respondent

**Counsel of Record*

42pp

QUESTIONS PRESENTED

I. MAY A FEDERAL COURT, CONSISTENT WITH THE ELEVENTH AMENDMENT, VACATE A DECISION BY A STATE COMMISSIONER OF EDUCATION MADE IN VIOLATION OF THE EDUCATION OF THE HANDICAPPED ACT ("EHA") AND REINSTATE THE DECISION OF A STATE HEARING OFFICER AWARDING ADDITIONAL EDUCATION?

II. IS AN ORDER BY A FEDERAL COURT REQUIRING ADDITIONAL EDUCATION TO REMEDY THE CONTINUING EFFECTS OF THE DEPRIVATION OF A HANDICAPPED CHILD'S EDUCATION BY STATE OFFICIALS PROSPECTIVE RELIEF WHICH DOES NOT CONTRAVENE THE ELEVENTH AMENDMENT?

III. DOES THE EHA'S COMMAND THAT DECISIONS IN SPECIAL EDUCATION HEARINGS BE FINAL AND IMPARTIAL PERMIT A STATE COMMISSIONER OF EDUCATION TO REVIEW DECISIONS CONCERNING ADMISSIONS TO STATE-SUPPORTED SCHOOLS RENDERED BY A STATE-LEVEL HEARING OFFICER APPOINTED BY THE COMMISSIONER?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
Statutory Provisions	viii
Statement of the Case	1
a. Administrative Proceedings	3
b. Proceedings in the District Court	5
c. Proceedings in the Court of Appeals	5
REASONS WHY THE PETITION SHOULD BE DENIED	8
I. The Court of Appeals' Decision Raises No Issues of Precedential Importance and Has No Applicability Extending Beyond the Unique Facts of This Case.	8
II. The Court of Appeals' Decision Presents No Substantial Issue Under the Eleventh Amendment	10
A. The Court of Appeals' Order Reinstating the Decision of the State Hearing Officer Does Not Implicate the Eleventh Amendment	11
B. There Is No Substantial Issue Under the Eleventh Amendment Because a Federal Court May, Consistent With the Principles Articulated in *Milliken* v. *Bradley*, Order Compensatory Education	12

PAGE

III. This Court Need Not Reach the Question of Whether the Commissioner's Review of the Hearing Officer's Decision Violates the Finality and Impartiality Requirements of the EHA 16

A. This Court Need Not Reach the Finality and Impartiality Issues Raised by the Petitioner Because Other Procedural Violations Found by the Court of Appeals Justified the Relief Ordered 16

B. Because the Commissioner Changed the Regulations at Issue in This Case to a Two-Tiered Review System, the Decision of the Court of Appeals Will Have No Impact on the Commissioner's Exercise of His Responsibilities Under the EHA. 18

C. There Is No Conflict in the Circuits Over Whether State Level Hearing Decisions Under the EHA Are Administratively Reviewable; the Act Clearly Requires That Decisions After a State Level Hearing Be Final, Subject Only to Judicial Review 20

D. Since the Commissioner's Review Clearly Violated the EHA's Finality Requirement, this Court Need Not Address the Partiality of the Commissioner's Review 23

CONCLUSION 26

TABLE OF AUTHORITIES

PAGE

Cases

Alexopoulos v. *San Francisco School District*, 817 F.2d 551 (9th Cir. 1987) 14

Brandon E. v. *Wisconsin Dep't of Public Instruction*, 595 F. Supp. 740 (E.D. Wis. 1984) 23

Brown v. *Board of Education*, 347 U.S. 493 (1954) .. 14

Burlington School Committee v. *Department of Education*, 471 U.S. 359 (1985) 14

Doe by Gonzales v. *Maher*, 793 F.2d 1470 (9th Cir.1986), *aff'd sub nom. Honig* v. *Doe*, 108 S. Ct. 592 (1988) 13

Eberle v. *Board of Public Education*, 444 F. Supp. 41 (W.D. Pa 1977), *aff'd mem.*, 582 F.2d 1274 (3d Cir. 1978) 21

Edelman v. *Jordan*, 415 U.S. 651 (1974) 10

Ex Parte Young, 209 U.S. 123 (1908) 11

Gary A. v. *New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986) 13

Green v. *Mansour*, 474 U.S. 64 (1985) 12

Helms v. *McDaniel*, 657 F.2d 800 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982) 20

Honig v. *Doe*, 108 S. Ct. 592 (1988) 22

Miener v. *State of Missouri*, 673 F.2d 969, *cert. denied*, 459 U.S. 909 (1982) 13-14

Miener v. *State of Missouri*, 800 F.2d 749 (8th Cir.) (1986) 14

PAGE

Milliken v. *Bradley*, 433 U.S. 267 (1977) 12, 13, 14

Monahan v. *State of Nebraska*, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983) 20

Muth v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *cert. granted sub nom. Gilhool* v. *Muth*, 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989) 8, 9, 10, 23

Muth v. *Smith*, 646 F. Supp. 280 (E.D. Pa. 1986), *aff'd sub nom. Muth* v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *cert. granted sub nom. Gilhool* v. *Muth*, 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989) 20

New York Institute for the Blind, 254 N.L.R.B. 664 (1981) 2

Quern v. *Jordan*, 440 U.S. 332 (1979) 12

Victoria L. v. *District School Board*, 741 F.2d 369 (11th Cir. 1984) 23

Federal Statutes

20 U.S.C. § 1412(2) 15

20 U.S.C. § 1413(b) 24

20 U.S.C. § 1415 6

20 U.S.C. § 1415(b)(2) 24

20 U.S.C. § 1415(c) 6, 20

20 U.S.C. § 1415(e)(1) 20

20 U.S.C. § 1415(e)(2) 20

PAGE

20 U.S.C. § 1415(e)(3) 8, 17

State Statutes

N.Y. Educ. L. 4201 ..... 2, 24

N.Y. Educ. L. 4401 *et seq.* 2

Federal Regulations

34 C.F.R. § 300.512(a) 3, 17

34 C.F.R. § 300.512(b) 4

34 C.F.R. § 300.550(b)(2) 15

State Regulations

8 N.Y.C.R.R. § 200.5(a) 3

8 N.Y.C.R.R. § 200.5(d) 6

8 N.Y.C.R.R. § 200.7(d) (1986) 3, 9

8 N.Y.C.R.R. § 200.7(d) (1987) 9

8 N.Y.C.R.R. § 200.7(d)(1)(1986) 6, 19

8 N.Y.C.R.R. § 200.7(d)(1)(1987) 19

8 N.Y.C.R.R. § 200.7(d)(1)(ii)(1987) 19

8 N.Y.C.R.R. § 200.7(d)(3) (1987) 20

PAGE

Other Authorities

Brief of *Amici Curiae* American Civil Liberties Union, *et al.*, *Gilhool* v. *Muth*, *cert. granted*, 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989). 9

121 Cong. Rec. H37025 (daily ed. Nov. 18, 1975). . . . 14, 15

121 Cong. Rec. H37030 (daily ed. Nov. 18, 1975). . . . 14, 15

121 Cong. Rec. S37415 (daily ed. Nov. 19, 1975) 24

121 Cong. Rec. S37416 (daily ed. Nov. 19, 1975) 17

S. Rep. No. 168, 94th Cong., 1st. Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 1425 14

STATUTORY PROVISIONS

20 U.S.C. § 1415(c) provides:

> If the hearing . . . is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C. § 1415(e)(1) provides:

> (e)(1) A decision made in a hearing . . . shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection [by civil action]. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS K. SOBOL, as Commissioner of the New York State Education Department,

Petitioner,

v.

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Clifford Burr, by his parents and next friends, Kenneth and Betty Burr, respectfully requests that this Court deny the petition for a writ of *certiorari*, seeking review of the opinion and judgment of the United States Court of Appeals for the Second Circuit. That opinion is reported at 863 F.2d 1071 (2d Cir. 1988).

Statement of the Case

The relevant facts of this case are simple, notwithstanding the lengthy, complex and occasionally misleading recitation in the petition for *certiorari*. Clifford Burr is a severely handicapped young man, now aged 21, who suffers from blindness, profound mental retardation and cerebral palsy. Appendix ("App.") at 45a. In 1984, the private school he attended

at public expense under the Education of the Handicapped Act ("EHA") closed. *Id.* The New York City Board of Education, which had primary responsibility for arranging an appropriate placement could not do so,[1] leading Clifford's parents to request that petitioner, Commissioner of the New York State Education Department ("Commissioner"), appoint Clifford to a "state-operated" or "state-supported" school. The Commissioner referred Clifford to a state-supported school, the New York Institute for the Education of the Blind ("Institute").[2] There then began a series of illegal

---

1. After receiving notification of the plan to close Clifford's private school, the Committee on the Handicapped ("COH") of Clifford's local school district initially recommended placement in a proposed program at P.S. 396 in Brooklyn, New York. After the Burrs objected that the school had not yet developed a curriculum, App. at 80a, 95a, and the assistant superintendent of citywide programs expressed doubts as to whether this program was appropriate for Clifford, App. at 36a, the COH withdrew its recommendation and determined that there was no appropriate program for Clifford in the New York City public school system. *Id.* Subsequently, the P.S. 396 recommendation was reinstated, App. at 108a n. 21, and an impartial hearing officer ruled that the P.S. 396 placement was inappropriate. App. at 109a n. 23. That decision was not appealed by the New York City Board of Education and is therefore final.

2. Petitioner erroneously claims that the Commissioner's authority over state-supported schools such as the Institute is no different from his authority over private schools in the state. Petition for a writ of *certiorari* ("Petition"), at 17. Most importantly for this case, the Commissioner has power to appoint pupils to the Institute, N.Y. Educ. L. § 4201(2)(c), whereas he does not have the specific statutory power to admit a student to a private school when the student has been rejected by the private school. *See* N.Y. Educ. L. § 4401, *et seq.* Moreover, the Commissioner provides almost all the funds for the Institute and determines its curriculum and budget far beyond any degree of control that he exerts on private schools in the state. *See New York Institute for the Education of the Blind*, 254 N.L.R.B. 664 (1981) (holding that the Institute is an agent of the State exempt from jurisdiction of the National Labor Relations Act).

delays that eventually kept Clifford out of school for more than one and one-half years. The Institute took more than twice the permitted length of time to complete its evaluation of Clifford, *see* 8 N.Y.C.R.R. §§ 200.7(d)(1986), 200.5(a), and then rejected him, App. at 46a-47a, allegedly on the ground that it did not have a program from which he could benefit.[3]

a. Administrative Proceedings

The Burrs promptly requested a hearing on December 21, 1984, in accordance with the procedures under the EHA and similar New York State regulations. 8 N.Y.C.R.R. § 200.7(d) (1986). The Commissioner appointed a hearing officer as provided in the then applicable New York State regulations. Although the EHA requires that a hearing officer *render a decision* within 45 days after the request for a hearing, 34 C.F.R. § 300.512(a), the Burrs' hearing did not even begin until May 2, 1985 and did not conclude until December 11, 1985. The decision of the hearing officer was not rendered until January 27, 1986, more than a year after the request for a hearing. The hearing officer permitted testimony on many issues he later found irrelevant. As the hearing officer acknowledged, "It is readily apparent in retrospect that the hearing could have, and should have, been curtailed.... I should have restricted Respondent [Institute] in regard to issues." App. at 109a n.23. The Commissioner subsequently stated,

---

3. In its letter of rejection, the Institute told the Burrs that Clifford did not have academic potential and would not benefit from enrollment in an educational program for the blind. App. at 46a. As the hearing officer found, the Institute failed to mention its Frampton Hall Program for the multiply handicapped, in which blind profoundly retarded students were enrolled. App. at 111a-115a.

"the delay in this instance appears to be attributable solely to the management of the hearing by the hearing officer, and is unconscionable." App. at 42a.

The hearing officer found that the Institute was an appropriate placement for Clifford. App. at 118a. In recognition of Clifford's failure to receive appropriate education during the unlawfully protracted proceedings, the hearing officer ordered that Clifford's education be extended until the end of the school year in which he reaches the age of 22 years, a year beyond the normal end of schooling under the EHA. App. at 120a-121a.

The Institute then appealed the hearing officer's decision to the Commissioner, and once again illegal delays ensued. Although the EHA provides that decisions of hearing officers appointed by the state educational agency be final except for judicial review, *see infra* at Point III C, the Commissioner accepted the appeal. Furthermore, although EHA regulations require administrative appeals, where permitted, to be decided in 30 days, 34 C.F.R. § 300.512(b), the Commissioner took 49 days.

The Commissioner agreed with the hearing officer on the principal issue in the case, that the Institute is an appropriate placement for Clifford. However, the Commissioner rejected the hearing officer's order to extend the period of Clifford's education, even though he found the delays in the administrative process "unacceptable" and "unconscionable." App. at 42a.

The end result was that Clifford was out of school from September 1984 until June 10, 1986, almost two full school years. During that period, he received no education whatsoever, aside from intermittent home tutoring provided by the New York City Board of Education.

b. Proceedings in the District Court.

Clifford, by his parents, commenced this action in September 1986 in the United States District Court for the Southern District of New York. App. at 28a. The complaint, as amended, sought to reinstate that portion of the decision of the hearing officer that extended Clifford's education under the EHA to the end of the school year in which he attains the age of 22. A supplemental complaint was later filed to assert a claim against petitioner for attorney's fees arising from the administrative proceedings in which Clifford prevailed on the issue of appointment to the Institute.

On November 9, 1987, the district court (Carter, J.) issued an opinion dismissing Clifford's claims against petitioner. App. at 26a-33a. On March 9, 1988, the district court denied Clifford's claim for attorney's fees against the petitioner for the administrative process, and granted Clifford leave to file an amended supplemental complaint seeking such fees from the Institute, which the court found was the adverse party in the administrative proceedings. App. at 25a. On March 18, 1988, the district court certified all claims against the petitioner for appeal pursuant to F.R.C.P. 54(b). App. at 5a.

c. Proceedings in the Court of Appeals

Clifford appealed the district court's order dismissing his claims against petitioner to the United States Court of Appeals for the Second Circuit (Feinberg, C.J.), which exercised jurisdiction over the due process claims and reversed the judgment of the district court.[4] The court held that

---

4. The court of appeals ruled that, given the pendency of the attorney's fee claim against the Institute, the district court exceeded its discretion in certifying the attorney's fees claim against petitioner, and, therefore the court lacked jurisdiction over the attorney's fees claim against the Commissioner on this appeal. App. at 6a-7a.

Clifford was injured by the illegal delays in the hearing process. The court also found that petitioner's review of the hearing officer's decision violated the finality and impartiality provisions of the EHA. App. at 9a-13a. The court vacated the Commissioner's decision and reinstated the final decision of the state appointed impartial hearing officer who had extended Clifford's education for one year to provide him with the full educational period required by the EHA. App. at 16a-17a.

The court found that the protraction of Clifford's hearing for 13 months constituted a gross violation of federal time limits. App. at 9a. In addition, the court determined that while New York State regulations, 8 N.Y.C.R.R. §§ 200.5(d), 200.7 (d)(1) permitted the Commissioner to review the decision of the state appointed hearing officer, the controlling provisions of the EHA, 20 U.S.C. § 1415, prohibit such review by mandating that the decision of a state appointed hearing officer be final.[5] App. at 12a, 13a. *See infra* at Point III C.

The EHA also requires that the reviewing officer at the state level be impartial. 20 U.S.C. § 1415 (c). The court determined that the Commissioner was not an impartial review officer in the unusual circumstances of this case "because he has extensive responsibilities and is integrally

---

5. The court noted that the United States Department of Education had warned petitioner that these New York regulations might jeopardize federal approval under the EHA. App at 12a. Thereafter, the New York State Education Department, in 1987, amended its regulations so that the Commissioner no longer appoints the hearing officer where state supported schools are involved. Rather, the appointment is made by a local school board. *See* Petition at 4 n.5 and discussion *infra* at Point III B.

involved with the operation of state supported schools, such as the Institute." App. at 13a. *See infra* at Point III D.

In light of these violations of the EHA, the court vacated the Commissioner's decision, thereby reinstating the decision of the hearing officer. In finding that this action did not implicate the eleventh amendment, the court stated:

> [W]e believe that it is possible to reinstate the relief fashioned by the hearing officer without addressing the eleventh amendment issue. This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decisionmaker designated by the State and is not constrained by the eleventh amendment.

App. at 16a-17a.

Moreover, while not essential to its holding, the court stated that the relief awarded to Clifford is "purely prospective in nature, and any effect on the state treasury is ancillary to such relief and therefore permissible despite the eleventh amendment." App. at 17a.

The court reversed the district court's order and remanded to the district court with instructions to vacate the Commissioner's decision and reinstate the hearing officer's decision. The court's judgment was entered on December 12, 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Court of Appeals' Decision Raises No Issues of Precedential Importance and Has No Applicability Extending Beyond the Unique Facts of This Case.

In contrast to *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *cert. granted sub nom. Gilhool v. Muth*, 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989), where the Third Circuit abrogated the states' eleventh amendment immunity under the EHA, and disqualified a chief state school officer from reviewing any special education appeal, this case presents no such far-reaching holdings. The facts of the *Burr* case are unique, and differ in almost every respect from the typical special education case in the federal courts. It was these facts that led the court of appeals to a novel remedy for Clifford's injury which will rarely be replicated.

First, the delay in the hearing which the court of appeals found violative of the act was extraordinary; the sixteen hearing days, one of the longest impartial hearings ever held in New York State, stretched over a period of 13 months. App. at 52a. Secondly, the injury to Clifford resulting from this delay was compounded by factors not typical in the special education context. Because of the closing of his state-funded private school placement, Clifford remained out of school during the entire pendency of the administrative proceeding, nearly two full school years. In the typical special education appeal, the "stay put" provisions of the Act, 20 U.S.C. § 1415(e)(3), would protect against this extreme injury. The situation was exacerbated by the inability of Clifford's parents to front the costs of his education in a private school, as the father did in the *Muth* case. It was this confluence of circumstances that led the hearing officer to extend Clifford's education as the only way to provide him meaningful relief.

The court of appeals agreed and reinstated that decision. App. at 16a, 17a.

A second unique aspect of the facts here is that the administrative review process which the court of appeals found violated the impartiality and finality requirements of the EHA has been entirely revamped. *Compare* 8 N.Y.C.R.R. § 200.7(d) (1986) *with* 8 N.Y.C.R.R. § 200.7(d) (1987).[6] A dispute between a parent and the Commissioner over appointment to a state-supported school is no longer resolved by the Commissioner, as was true in Clifford's case, but by an independent state level review officer.[7]

Faced with these unique factual circumstances, the court of appeals framed an opinion narrowly addressing the limited legal issues presented. The court of appeals found it unnecessary to rule on the broad question presented in *Muth:* whether the EHA or the Rehabilitation Act abrogates the eleventh amendment. Even if this Court were to hold in *Muth* that the eleventh amendment is not abrogated in EHA cases, the Second Circuit's holding is not disturbed. As will be discussed more fully, *infra* at Point II, it was the hearing officer who granted Clifford a period of education to make up for the schooling lost due to the hearing delay; the court of appeals

---

6. A copy of the regulations is attached to this brief as Exhibit A. Material in brackets was included in the regulations applicable to Clifford's case but was deleted by the 1987 amendments. Material which is underlined was added by the 1987 amendments.

7. Even the original process that the court of appeals considered is of no national importance. Only three states—Pennsylvania, New York and Minnesota—retain a system of chief state school officer review. Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 19, Appendix, *Gilhool* v. *Muth, cert. granted,* 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989).

merely reinstated that decision. Furthermore, in contrast to *Muth*, the court of appeals in *Burr* granted no monetary relief.

With regard to the procedural violations in the review process, the court of appeals in *Burr* decided only that review by a chief state school officer of a *state* hearing officer's decision is violative of the impartiality and finality provisions of the Act. The *Muth* hearing was a *local* hearing from which the EHA expressly permits additional administrative review; the *Burr* hearing was a *state level* hearing from which the EHA expressly prohibits further administrative appeal. The Burrs never argued that state education commissioners should be barred from reviewing local impartial hearing decisions. Even should this Court rule in *Muth* that chief state school officers may review local hearing decisions, such a holding would not be dispositive here.

II.

The Court of Appeal's Decision Presents No Substantial Issue Under the Eleventh Amendment.

Certiorari should be denied as to petitioner's eleventh amendment questions because no substantial issue of a violation of that amendment is presented. The court of appeals did not impose any monetary or coercive relief which might implicate state sovereign immunity; rather, it merely vacated a state commissioner's order, thus leaving the ruling of a state impartial hearing officer in effect. App. at 16a. Furthermore, even if the court of appeals itself had granted Clifford education beyond the normal age of 21 years under the EHA, such relief is purely prospective and fully compatible with this Court's eleventh amendment jurisprudence. *See Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974).

A. The Court of Appeals' Order Reinstating the Decision of the State Hearing Officer Does Not Implicate the Eleventh Amendment.

The court of appeals found no eleventh amendment implications in its order, stating:

> This panel is merely vacating the decision of the Commissioner, and reinstating the decision of the hearing officer. The hearing officer is a decision-maker designated by the State and is not constrained by the eleventh amendment. Therefore, we do not implicate the eleventh amendment by expunging the bar to his decision.

App. at 16a. Thus, this Court should not grant *certiorari* as this case presents no eleventh amendment issue.

The authority of federal courts to order state officials to conform their conduct to federal law has long been recognized. *See Ex Parte Young*, 209 U.S. 123, 167 (1908). In expunging the State Commissioner's decision, the court of appeals did no more than void the violation of the EHA, since the Act forbids further administrative review of state level hearings. Since the Commissioner's very review violated the EHA, his decision constitutes an ongoing infringement of federal law. The cases cited by petitioner, Petition at 12, are therefore inapposite. The court of appeals did not itself order compensatory education; rather, Clifford's continued education was ordered by the hearing officer. The only effect of the decision of the Second Circuit is to reinstate the hearing officer's decision by expunging the Commissioner's partial reversal of that decision. That monies will be paid from the state treasury to fund the hearing officer's award of education is the result of the hearing officer's decision, not that of the federal courts. At most, any cost to the state is an ancillary

effect of the court's order, and as such is permitted by the eleventh amendment. *See Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).

Green v. *Mansour*, 474 U.S. 64 (1985), does not require a different result. In *Green*, the plaintiffs had filed a federal court action seeking declaratory relief and notice relief similar to that ordered in *Quern* to correct past law violations. 474 U.S. at 65. The plaintiffs had not been awarded the relief sought in federal court in any prior state proceeding. In contrast, here Clifford was awarded additional education by a state hearing officer, and the court of appeals merely reinstated that relief by vacating the Commissioner's illegal decision. Furthermore, the plaintiffs in *Green* could not claim any ongoing violation of federal law because, during the pendency of their litigation, Congress changed the federal statute in question. *Id.* at 65. In this case there is an ongoing violation of federal law, the denial to Clifford Burr of the number of years of education the EHA guarantees. Indeed, the injury to Clifford from the Commissioner's decision will not even occur until September 1989 if he is not then permitted to continue his education at the Institute.

The decision of the court of appeals, which did no more than void the Commissioner's illegal decision, did not involve the demands on state treasuries or the control of actions of state officials by federal courts barred by the eleventh amendment.

B. There Is No Substantial Issue Under the Eleventh Amendment Because a Federal Court May, Consistent with the Principles Articulated in *Milliken* v. *Bradley*, Order Compensatory Education.

Even if the court of appeals had directly ordered the State to provide compensatory education, that order would not have

violated the eleventh amendment. Such relief is virtually identical to that awarded in *Milliken* v. *Bradley*, 433 U.S. 267 (1977). In *Milliken*, this Court held that a federal court order requiring a state financed remedial reading program, designed to overcome the ongoing effects of educational deprivation caused by official misconduct, provided prospective relief and was therefore permissible under the eleventh amendment. *Id.* at 290. In the education context, prospective relief is designed not "to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*," but, given the significant deficiencies caused by the antecedent violations, requires "time, patience, and the skills of specially trained teachers" to "help dissipate the continuing effects of past misconduct." *Id.* An award by the court of education to overcome the ongoing effects of the educational deprivation Clifford Burr suffered because of the Commissioner's violations of federal law in the hearing and review process is precisely the kind of prospective relief approved by *Milliken*.[8]

Petitioner's assertion that such an award directly conflicts with decisions in the Seventh and Eighth Circuits is erroneous. The plaintiffs in *Gary A.* v. *New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986), sought retroactive money damages and not prospective compensatory education as Clifford Burr did here.[9] In *Miener* v. *State of Missouri*, 673

---

8. Such relief would have been prospective if awarded to offset educational deprivation caused by either the Commissioner's failure to adhere to the impartiality and finality requirements of the EHA or his failure to insure that the State's hearing officer adhere to the EHA's 45-day limit on administrative hearings.

9. *Doe by Gonzales* v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub nom. Honig* v. *Doe*, 108 S. Ct. 592 (1988), also involved money damages.

F.2d 969, *cert. denied*, 459 U.S. 909 (1982), the plaintiff's request for compensatory education was initially denied, but in *Miener* v. *State of Missouri*, 800 F.2d 749 (8th Cir. 1986), which petitioner inexcusably fails to mention, the court of appeals reversed its earlier decision and granted the plaintiff compensatory education in reliance on this Court's ruling in *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), holding that monies which would have been spent all along, if not for official misconduct, are not damages. Only the Ninth Circuit has suggested in *Alexopoulos* v. *San Francisco School District*, 817 F.2d 551 (9th Cir. 1987), that compensatory education in EHA cases is more akin to damages than to the prospective compensatory education approved in *Milliken*. That statement was wholly unnecessary to the decision since the court held that plaintiff's claims either lacked merit or were time-barred. *Alexopoulos*, 817 F.2d at 556.

The EHA, like the desegregation laws involved in *Milliken*, was enacted in response to a long history of discrimination in education and to many court decisions affirming a constitutional right to equal educational opportunities.[10] To combat

---

10. "Regrettably, equal educational opportunity has yet to become a reality for millions of handicapped children." 121 Cong. Rec. H37030 (daily ed. Nov. 18, 1975). "... for years, handicapped children have been kept in the dark, deprived of a free, full public education." *Id.* The Senate Report accompanying the EHA emphasized that the Supreme Court's 1954 desegregation decision in *Brown* v. *Board of Education*, 347 U.S. 493 (1954), established that the Constitution guarantees the opportunity of an education as "a right which must be made available to all on equal terms." S. Rep. No. 168, 94th Cong. 1st Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1425, 1430. "Thus far, there have been some 46 court cases regarding the right to an education for each handicapped child." 121 Cong. Rec. H37025 (daily ed. Nov. 18, 1975).

discrimination against handicapped children and to insure their rights to equal education, the EHA mandates that all handicapped children between the ages of 3 and 21 receive a free appropriate public education. 20 U.S.C. § 1412(2).

Congress intended that handicapped children receive appropriate education for 18 years and not just for those periods when state officials agree to comply with the EHA.[11] Representative Perkins, Chairman of the House Committee on Labor and Education, emphasized that the EHA's safeguards were "designed to further the congressional goal of ensuring a full educational opportunity" and that "the most important point to be made [is] ... there [should] be [no] disruption in providing the benefits of this act to handicapped children ..." 121 Cong. Rec. H37025 (daily ed. Nov. 18, 1975). The educational period provided by the EHA was intended to "provide the opportunity for these children to reach their educational potential and to develop their personal talents and capabilities." *Id.* at H37030.

The Commissioner denied Clifford Burr two years of the education that the federal law guaranteed him by violating Clifford's due process rights under the EHA.[12] The hearing

---

11. Because Clifford was already 7 years old when the EHA was enacted, he was entitled to 14 full years of education.

12. The home instruction that Clifford received during a portion of the review process was not "appropriate" education within the meaning of the EHA. Home instruction is only appropriate when the nature or severity of the student's handicapping condition renders him unable to attend school with his peers. 34 C.F.R. § 300.550(b)(2). The deficiency of home instruction in this case is evidenced by the findings of the Commissioner and his hearing officer that the appropriate program for Clifford was at the Institute, a full-time, in-school program.

record clearly shows that Clifford has the potential for further development. App. at 91a-92a. A denial of two years of education certainly has ongoing effects for any child, especially for a severely handicapped child like Clifford. As the court of appeals stated, without an award of compensatory education, "Clifford's right to an education between the ages of three and twenty-one is illusory." App. at 15a.

In sum, this case does not involve a federal court order of compensatory education; rather, it was the state hearing officer who ordered the year of education beyond age 21. But even if a federal court had ordered an additional year of education, such relief would have been prospective relief, and thus permissible under the eleventh amendment.

III.

This Court Need Not Reach the Question of Whether The Commissioner's Review of the Hearing Officer's Decision Violates the Finality and Impartiality Requirements of the EHA.

A. This Court Need Not Reach the Finality and Impartiality Issues Raised by the Petitioner Because Other Procedural Violations Found by the Court of Appeals Justified the Relief Ordered.

As petitioner acknowledges, Petition at 9, the court of appeals found that the Commissioner had violated Clifford Burr's procedural rights under the EHA both (1) because of the egregious delay in the impartial hearing, App. at 9a-10a, and (2) because the Commissioner's review of the hearing officer's decision violated the EHA's requirement that state level hearings be final and impartial. App. at 10a, 13a. The Commissioner sought *certiorari* only on the second issue, but

since the first was sufficient to justify the relief ordered by the court of appeals,[13] this Court need not grant *certiorari*.

One important goal of the procedural protections of the EHA is to prevent undue delay in the provision of free appropriate public education to handicapped children. The statute contemplates that the procedural protections established in the Act will facilitate prompt resolution of disputes between parents and educational professionals concerning the provision of education to handicapped children.[14] Consistent with this expectation, federal regulations require that an impartial hearing officer render his decision within 45 days of a parent's request for a hearing. 34 C.F.R. § 300.512(a). Contrary to this clear mandate, Clifford's hearing took over 13 months to complete. App. at 42a. The Commissioner's review also exceeded the 30 day limit under federal regulations. App. at 10a. As the court of appeals noted, "the

---

13. As was discussed more fully *supra* at Point II A, the court of appeals actually did no more than vacate the State Commissioner's decision.

14. *See, e.g.*, 121 Cong. Rec. S37416 (daily ed. Nov. 19, 1975) (remarks of Sen. Williams):

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved.

federal regulations were grossly violated in this case." App. at 9a.

In most cases the "stay-put" provisions of the EHA, 20 U.S.C. § 1415(e)(3), which permit a child to stay in his current educational placement pending the outcome of an administrative hearing, mitigate the effects of hearing delay. Here, Clifford could not avail himself of the "stay-put" protection because the private school he had been attending closed and he was not in school. As the court below recognized, Clifford suffered a total deprivation of education during the pendency of the proceedings, "the precise unfortunate result that the 'stay-put' provision was designed to prevent." App. at 10a. The Commissioner concedes that the delay was "attributable solely to the management of the hearing by the [state-appointed] hearing officer." App. at 42a. The court of appeals found the hearing officer's violation of the regulations stated a claim under the Act, justifying the relief it granted. App. at 10a. Since petitioner did not seek *certiorari* on this issue, an unchallenged violation of the EHA will remain regardless of any decision with respect to the finality and impartiality issues, warranting the denial of petitioner's request for *certiorari* on the finality and impartiality issues.

B. Because the Commissioner Changed the Regulations at Issue in This Case to a Two-Tiered Review System, the Decision of the Court of Appeals Will Have No Impact on the Commissioner's Exercise of His Responsibilities Under the EHA.

During the pendency of this litigation, at the urging of the United States Department of Education, App. at 12a, the Commissioner changed the state regulations at issue in this case, governing review of appointment of pupils to state supported schools. Thus, the court of appeals' decision will have no future impact in New York. Petition at 4, n 5. The new

regulations eliminate review by the Commissioner of the decision of a state level hearing officer. The Commissioner's revision of his regulations both rebuts his claim that the court of appeals' decision will disrupt the administration of handicapped education in New York State, Petition at 16, and makes it unnecessary for this Court to address the finality issue raised by the Commissioner's petition.

Prior to 1987, applicable New York regulations required parents of handicapped children to apply to the State Education Department for appointment to state-supported schools like the Institute. The Commissioner then referred the matter to a state-supported school which made a recommendation to the Commissioner as to whether placement was appropriate. If the recommendation was against placement, the parents could request a hearing conducted by a hearing officer appointed by the Commissioner, and either the parents or the state-supported school could appeal the decision to the Commissioner. 8 N.Y.C.R.R. § 200.7(d)(1) (1986).

Under the new regulations, parents may apply either to the Commissioner or to their local school district for admission and are referred to a state-supported school for evaluation. 8 N.Y.C.R.R. § 200.7(d)(1) (1987). It is the local school district rather than the state-supported school which makes a recommendation to the Commissioner on whether the placement is appropriate. If the local district fails to recommend the child for admission to the state-supported school, the parents may request an impartial hearing conducted by a hearing officer *appointed by the local school district,* and the local decision is reviewable by the Commissioner. 8 N.Y.C.R.R. § 200.7(d)(ii) (1987). Such a review in a two-tiered system is consistent with the EHA's provision for state level review of decisions of hearings conducted at the level of

the local educational agency.[15] If the Commissioner himself declines to appoint the child even after a favorable local review, there is a state level hearing with no review by the Commissioner. 8 N.Y.C.R.R. § 200.7(d)(3)(1987). Accordingly, the finality issue presented under the old regulations will not reoccur. Since the regulations under which this case arose are no longer in effect, this Court should deny *certiorari*.

C. There Is No Conflict in the Circuits Over Whether State Level Hearing Decisions Under the EHA Are Administratively Reviewable; the Act Clearly Requires That Decisions After a State Level Hearing Be Final, Subject Only to Judicial Review.

The EHA provides at 20 U.S.C. § 1415(e)(1) that hearings shall be final, except that parties aggrieved by decisions after hearings conducted by *local or intermediate educational agencies* may appeal such decisions to the state educational agency. 20 U.S.C. § 1415(c). That the finality requirement clearly precludes further administrative review of state level hearings is evidenced by section 1415(e)(2) which grants judicial review to parties aggrieved by hearing decisions "who do not have the right to an appeal under" section 1415(c). There is no conflict in the circuits over the meaning of the finality requirement; every court which has considered the issue has required strict compliance with the finality requirements of the EHA. *See, e.g., Helms v. McDaniel,* 657 F.2d 800 (5th Cir. 1981), *cert. denied,* 455 U.S. 946 (1982);

---

15. The question of whether the Commissioner himself may conduct such a review is a separate question discussed *infra* at Point III D.

Monahan v. *State of Nebraska*, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983); *Muth* v. *Smith*, 646 F. Supp. 280 (E.D. Pa. 1986), *aff'd sub nom. Muth* v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir.), *cert. granted on other grounds sub nom. Gilhool* v. *Muth*, 109 S. Ct. 52 (1988) (No. 87-1855, argued Feb. 28, 1989).[16]

There can be no question that the hearing Clifford Burr requested of New York's State Education Department was a state level hearing within the meaning of the EHA. App. at 11a-12a. The Commissioner concedes as much in his petition. Petition at 4, 19. Clifford Burr sought an impartial hearing to challenge the State Commissioner's failure to appoint him to a state-supported school for the blind. Nonetheless, the Commissioner argues that his review of decisions by hearing officers he appoints is merely a "more elaborate" procedural safeguard, and as such, is permitted by the EHA. Petition at 18.

The Commissioner's review of the hearing officer's decision can in no sense fairly be characterized as an additional procedural protection to the Burrs since they fully prevailed in the impartial hearing process and neither sought nor desired further review by the Commissioner; it was the Institute that appealed.[17] Furthermore, the review by the

---

16. As these cases make clear, finality violations may arise in a number of different contexts. The Burr proceedings appear to involve the first challenge to the authority of state commissioners of education to review hearing decisions concerning disputes with the state agency.

17. Thus, the Commissioner's citation to *dicta* in *Eberle* v. *Board of Public Education* 444 F. Supp. 41, 43 (W.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1274 (3d Cir. 1978), is inappropriate. The context of the court's remarks in that case was that the state could afford additional protections to parents.

Commissioner (at which point Clifford had been out of school one and one half years) delayed Clifford's appointment to the Institute for an additional school semester, during which time Clifford received no education. While acknowledging that the delay in Clifford's hearing was "unacceptable," "unconscionable," and solely the result of the "management of the hearing by the [state's] hearing officer," App. at 42a, the Commissioner denied Clifford any relief for the education he lost because the administrative proceedings had dragged on.

In what can charitably be called a half truth, the petitioner cites the United States Department of Education's approval of its plan for educating handicapped children as evidence that the federal agency approved New York's practice of permitting review of decisions of state level hearing officers. Petition at 10, 18 n. 12. As the Commissioner is well aware, the Department of Education directed New York State to revise its procedures with respect to admissions to state-supported schools in order to eliminate the conflict with the finality requirements of the EHA. App. at 12a. The Commissioner had been warned by the Department of Education that New York State's "plan might not be approved if changes were not made, advising the State that: 'In order to meet the requirements of the EHA, New York must institute procedures that insure that... [w]hen hearings concerning 4201 students are conducted by the [State Educational Agency], the hearing officer's decision is final.' " *Id.* The Commissioner then revised his regulations governing appointment of pupils to state-supported schools like the Institute, in response to the Department of Education's directive. Petition at 4.

Given this Court's traditional deference to the opinions of the agencies charged with interpreting federal statutes, *Honig* v. *Doe,* 108 S. Ct. 592, 604 (1988), the directive of the federal Department of Education, coupled with the unequivocal command in the EHA that decisions after state level

hearings be final and the complete absence of conflict among the circuits as to the meaning of the EHA's finality requirement, all demonstrate that this Court should not grant *certiorari* to address the finality issue raised by petitioner.

D. Since the Commissioner's Review Clearly Violated the EHA's Finality Requirement, this Court Need Not Address the Partiality of the Commissioner's Review.

The Commissioner's clear violation of the EHA's finality requirement justified the relief granted by the court of appeals regardless of whether that review also denied Clifford Burr's parents the right to an impartial review. Therefore this Court need not reach the impartiality question should it find that the Commissioner violated the finality requirements of the Act.

The Commissioner suggests that this case should be controlled by this Court's decision in *Muth* concerning whether the chief executive of a state education agency may be an impartial review officer of decisions in special education appeals. However, this case presents an unusual fact situation raising a very narrow impartiality question that does not arise in the *Muth* case. That case may determine whether or not chief state school officers may review hearing decisions concerning *disputes between parents and local or intermediate educational agencies*. The impartiality issue in this case thus differs significantly from the impartiality issue in *Muth* and the other circuit court decisions in two respects. First, this action involves state review of the decision of a state level hearing officer; secondly, it involves a hearing to resolve *a dispute between a parent and the state agency*. Unlike the impartiality issue raised in *Muth*, in which it can fairly be said that a conflict among the circuits exists, *compare Muth* v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988), *with*

Victoria L. v. *District School Board,* 741 F.2d 369 (11th Cir. 1984); *see also Brandon E.* v. *Wisconsin Dep't of Public Instruction,* 595 F. Supp. 740 (E.D. Wis. 1984), no court decision of which respondent is aware other than that below has ever even considered whether a review of a state hearing officer's decision by a chief executive officer of a state education agency is permitted under the EHA's impartiality requirement.

Congress recognized that states may choose to undertake their obligations under the EHA by providing education to handicapped students directly, rather than through local or intermediate educational agencies. 20 U.S.C. § 1413(b). As a result, they provided for hearings both at the local and at the state agency level, 20 U.S.C. § 1415(b)(2), recognizing that disputes may arise, as they did in this case, between a state educational agency and the parents of a handicapped child. The Act requires that the state agency appoint a hearing officer whom it does not employ to conduct the hearing. *Id.* To insure impartiality, Congress directed:

> [T]hat any hearings be conducted not by the agency itself, but at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party to any complaint presented. No hearing may be conducted by any employee of the State or local educational agency involved in the education of care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings...

121 Cong. Rec. S37415 (daily ed. November 19, 1975).

The Burrs' complaint that their son had been denied admission to the Institute was surely a complaint to the state education agency. The Commissioner's attempt to blame the

Institute for any harm to Clifford, thereby removing himself from the dispute over Clifford's admission, ignores the fact that the Commissioner holds the sole power of appointment to the Institute, a state-supported school where the state education department pays the full tuition. N.Y. Educ. L. §4201. Clifford's parents applied to the State Education Department for Clifford's admission to the Institute, App. at 36a; they requested a hearing from the State Education Department when, after several months, the Commissioner failed to appoint Clifford to the Institute, App. at 47a; the State Education Department appointed the impartial hearing officer who eventually conducted the hearing, App. at 51a; it was the State Commissioner to whom the Burrs pleaded for an interim placement during the prolonged hearing process. *Id.* Clearly, therefore, the Commissioner was a party to this dispute. For the Commissioner to retain the power to review decisions of hearing officers he appointed, involving disputes in which he is a party, clearly violates the EHA's impartial hearing requirement.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

KATHLEEN A. SULLIVAN*
MINNA J. KOTKIN
BLS Legal Services Corp.
One Boerum Place
Brooklyn, New York 11201
(718) 780-7994

ELLEN M. SAIDEMAN
HERBERT SEMMEL
New York Lawyers for the
Public Interest, Inc.
135 East 15th Street
New York, New York 10003
(212) 777-7707

Attorneys for Respondent

* *Counsel of Record*

April 12, 1989

Counsel gratefully acknowledge the assistance of Brooklyn Law School student interns Barbara Liese and Antonia Kousoulas.

EXHIBIT A

(1) General. (i) Private schools and special-act school districts for pupils with handicapping conditions, including summer schools, shall be eligible for approval by the commissioner to receive public funds for the education of pupils with handicapping conditions, provided such schools meet the criteria in this Part.

(ii) Facilities of educational programs located outside the continental United States shall not be eligible for approval.

(iii) Reimbursement rates shall be calculated according to New York State statutes and applicable regulations for all approved private schools, including out-of-state schools and for special-act school districts. However, the commissioner may accept reimbursement rates for out-of-state schools calculated by the state in which the school is located, provided those rates have been approved by the state in which the school is located.

(iv) Private schools seeking initial approval to be reimbursed with public funds shall have access to sufficient capital or other financial resources, other than revenues expected from New York State or local school districts, to cover all operating, property maintenance, leasing or purchase costs during the year of conditional approval.

(2) Approval of private schools for reimbursement with public funds. (i) Conditional approval for private schools shall be limited to a period of one school year, or the period of time required to complete approval, and will be based on:

(a) submission of program information forms;

(b) submission of budget or financial statement information, including evidence that the school has enough capital or other financial resources, other than State or local sources of revenue, to be able to operate for at least one year;

(c) a fire safety check by the New York State Division of Fire Prevention and Control for in-state private schools, and a State or local fire safety check for out-of-state schools;

(d) for schools operating as corporate entities, evidence of the following:

(1) for in-state not-for-profit schools, a charter or application for a charter from the Board of Regents, incorporating a school authorized to provide special education services;

(2) for in-state for-profit schools, approval by the commissioner of the school's incorporation for the provision of special education; or

(3) for out-of-state schools, a license or charter from the state education agency of the state in which the school is located; and

(e) at least one onsite program review visit by program or fiscal staff of the Office for Education of Children with Handicapping Conditions.

(ii) Final approval of schools which have had conditional approval:

(a) will be based on at least two site visits by program or fiscal staff of the Office for Education of Children with Handicapping Conditions during the year of conditional approval; and

(b) will take effect as of the date a final approval letter is issued by the commissioner, or his designee.

(3) Denial or termination of private school approval. (i) Private schools may be denied approval or removed from New York's list of private schools approved for reimbursement with public funds, or such approval may be terminated according to the following procedure:

(a) The commissioner or his designee will notify the school in writing of the reasons why denial or termination of approval is necessary, including a list of program or financial deficiencies and violations of State and Federal law or regulations which the commissioner believes to exist at the schools.

(b) Schools may reply to the commissioner's notification within 30 days, addressing the commissioner's statement of reasons, indicating whether deficiencies or violations exist, what steps may be taken to correct conceded deficiencies or violations, and the time period in which deficiencies or violations will be corrected. If no reply is received, termination will be effective 30 days from the date of receipt of the commissioner's notification.

(c) Requests for a hearing to review a proposed decision to deny or terminate approval may be made to the commissioner's designee. The request shall be made in writing to the commissioner's designee within 10 days of receipt of a notice of removal from the list.

(d) Schools may be removed from the approved list five days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of children attending the school, and listing the dangerous conditions at the school.

(b) *Operation and administration of private schools and State-operated and State-supported schools.* (1) Parents of children attending schools governed by this section shall not be asked to make any payments in lieu of, in advance of or in addition to, State, school district or county payments for allowable costs for children placed according to New York State procedures.

(2) The confidentiality of pupil records at schools governed by this Part shall be maintained, and parental access to such records shall be permitted, in a manner comparable to that required of school districts pursuant to 20 USC 1232g (*United States Code*, 1982 edition, volume 8, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1983 — available at the Office for Education of Children with Handicapping Conditions, Room 1073, Education Building Annex, Albany, NY 12234).

(3) No pupil attending any school governed by this section may be suspended for a period of five days or less for disciplinary reasons unless the pupil and the person in a parental relation to the pupil are, on request, given an opportunity for an informal conference. During this conference, the person in parental relation shall be authorized to ask questions of complaining witnesses. If the suspension is for more than five days, such suspension shall constitute a change in the pupil's educational placement and the parents shall be entitled to notice and review procedures listed in section 200.5 of this Part.

(4) The length of the school day shall be comparable to that required by section 175.5 of this Title. The school day shall include instructional services and related services, as required, but shall not include transportation.

(5) Instruction for not less than 180 days each year shall be provided for each pupil. Approved private schools and State-operated and State-supported schools shall submit calendars of such days in session to the commissioner for approval by July first of the preceding school year. All approved private schools shall comply with the Education Law regarding attendance. Attendance registers shall be available for inspection by appropriate personnel of the contracting school districts, the department, and the school district in which the school is located.

(6) Personnel qualifications and screening procedures. All professional instructional and supervisory personnel at schools governed by this section shall be appropriately certified in accordance with the provisions of Part 80 of this Title and section 200.6 of this Part. All noninstructional personnel at residential schools governed by this section shall be appropriately qualified in accordance with the provisions of section 200.15 of this Part. All persons applying to be employees or volunteers at residential schools governed by this section shall be screened in accordance with the provisions of section 200.15 of this Part.

(7) An approved private school, a State-operated school, or a State-supported school shall conform to all applicable fire and safety regulations of the State and municipality in which it is located. Each such school shall cause an annual inspection to be made in the manner set forth in subdivision 3 of section 807-a of the Education Law. A report of such inspection shall be made upon forms supplied by the commissioner and shall be maintained on file at the school. For schools subject to provisions of section 807-a of the Education Law, the report prepared pursuant thereto shall be deemed equivalent.

(c) *Additional operational and administrative provisions related solely to private schools.* (1) Application. An application shall be made to the commissioner by the board of education for approval of the placement of a pupil with a handicapping condition in an approved private educational facility which has been determined to be the least restrictive environment for the pupil. An annual application for the continued placement of a pupil with a handicapping condition in such approved facility shall be submitted by the board of education to the department prior to June first preceding the school year for which such continued placement is sought.

(2) No child with a handicapping condition shall be removed or transferred from an approved in-state school without the approval of the school district contracting for education of such child pursuant to section 4402 of the Education Law. No child with a handicapping condition shall be removed or transferred from an approved out-of-state school without the approval of the commissioner.

(3) Educational programs initially approved for reimbursement after September 1, 1981 shall provide instruction to a minimum of 13 children by September 1, 1982.

(4) A phase II individualized education program (IEP) and an educational progress report on each pupil shall be provided by the approved school to the committee on special education of the referring district or the referring agency at least annually. Other required data and/or reports shall be made available by the private school to the referring district or agency on request.

(d) *Appointment of blind, deaf and severely physically handicapped pupils to certain State-operated and State-supported schools pursuant to articles 85, 87 and 88 of the Education Law and chapter 1060 of the Laws of 1974.* (1) Application for State appointment of deaf, blind, severely physically handicapped or severely emotionally disturbed pupils to State-operated or State-supported schools for the blind, deaf, severely physically handicapped or severely emotionally disturbed shall be initiated by parents through application to the commissioner, supported by adequate written evidence of the blind, deaf or severely handicapping condition, or by the committee on special education of the school district responsible for the child. The commissioner or the committee on special education will direct the parents to make arrangements at a State-operated or State-supported school designated by the commissioner for an evaluation. Such school shall evaluate the child's special educational needs and eligibility for its program. [and]

(i) With respect to an application for admission to a State-operated school, or an application of a preschool child to a State-supported school, the school shall notify the parents and commissioner of the results of such evaluation, and recommend appointment if appropriate. In the case of a child not recommended for appointment to a particular school, or in the event of a change in a recommendation concerning the classification, placement or provision of a free appropriate public education to a pupil at a State-operated school or to a preschool child at a State-operated school, the school shall notify the parent. Such notification shall be comparable to that required by section 200.5(a) of this Part, shall include all reasons for lack of acceptance of the child into the program or for the change in the recommendation, and shall include

[state-operated or state-supported]

[or state-supported]

suggestions for more appropriate placement or program. The parent may file with the department a written request for a hearing before an impartial hearing officer who will be designated by the department. Such hearing officer shall not be an employee of the department. The procedures relating to the conduct of the hearing and review of the decision of the hearing officer shall be comparable to those set forth in section 200.5(c)-(d) of this Part.

(ii) With respect to an application for admission of a school-age child to a State-supported school, the school shall report the results of its evaluation to the committee on special education. Upon receipt of such report, the committee on special education shall conduct a meeting, in accordance with the provisions of paragraph (3) of subdivision (c) of section 200.4 of this Part, provided that appropriate representatives of the State-supported school shall be given the opportunity to attend and participate in the meeting which may be held at the State-supported school. The committee may recommend that the commissioner appoint the child to the State-supported school, or it may recommend a different placement. If the parents disagree with the recommendation of the committee on special education, they may request that the board of education appoint an impartial hearing officer to review that recommendation, and the hearing officer shall consider, together with all other relevant information, the evaluation conducted by the State-supported school. If the committee on special education has recommended a placement other than the State-supported school, and the hearing officer finds that such recommendation is inappropriate and that placement in the State-supported school would be appropriate, the hearing officer may order that the board of education recommend to the commissioner that the child be placed in the State-supported school. The decision of the hearing officer may be appealed in accordance with section 4404 of the Education Law.

(2) The approval of the commissioner in granting the State appointment, if appropriate, will be determined upon the following criteria:

[only those]

(i) Children between the ages of 3 and 21 residing in New York State, who are profoundly deaf, i.e., with a loss in excess of 80 db ISO in the better ear, or who are deaf and, based on a full and individual evaluation, are determined to be functionally profoundly deaf, who are deaf-blind, or who are severely physically handicapped, may receive appointments to the State-operated or State-supported schools and be included for State support for their education.

(ii) Children residing in New York State who are between the ages of 5 and 21 or who are receiving a special instructional program at the preschool level and who are legally blind may receive appointments to the State-operated or State-supported schools and be included for State support for their education.

(iii) Children between the ages of 5 and 21 residing in New York State who are severely emotionally disturbed may receive appointments to the State-operated or State-supported schools and be included for State support for their education.

(iv) Deaf or blind children appointed on a day basis shall be appointed to the school for the deaf or blind nearest their place of residence; provided that, with the consent of the child's parent, a blind child may be appointed to the Lavelle School for the Blind in the City of New York or the New York Institute for Education of the Blind in the City of New York without regard to which such State-supported school is nearer to the child's place of residence. Children may be appointed to a school for the deaf or blind on a residential basis when daily transportation between the child's place of residence and such school is not feasible, or when it is established to the satisfaction of the commissioner that such placement is necessary to meet the individual educational needs of the pupil. Appointments for severely physically handicapped children to attend the Human Resources School shall be on a day basis only.

[students between the ages of 3 and 21, for legally blind students, at least kindergarten age or receiving a special instructional program at the preschool level, who are residents of New York State,]

(3) If the commissioner declines to make a State appointment of a child who has been recommended for appointment by a State-operated or State-supported school, or if he seeks to change a child's classification or placement against the recommendation of the State-operated or State-supported school which such child attends, the parent may file with the department a written request for a hearing before an impartial hearing officer who will be designated by the department. Such a hearing officer shall not be an employee of the department. The procedures relating to notice and review of a refusal of State appointment or of a change of classification or placement by the commissioner shall be comparable to those set forth in section 200.5(a)-(c) of this Part, and shall be provided by the Education Department. Review of the determination of the hearing officer shall be available by means of a proceeding pursuant to article 78 of the Civil Practice Law and Rules or 20 USC 1415, and may be instituted by any party to the hearing.

(4) State-appointed pupils shall be eligible for transfer between State-operated and/or State-supported schools upon the approval of the commissioner. State-appointed pupils being considered for transfer shall remain in the school they currently attend until an alternate school placement is finalized. Such transfers shall be subject to the applicable placement and review procedures set forth in paragraph (1) of this subdivision.

(5) State-operated or State-supported schools may apply to the commissioner for the termination of the appointment of a pupil who had been admitted to the school pursuant to subparagraph (1)(ii) of this subdivision. An application for this purpose shall set forth the basis for such action and shall be made only after compliance with the applicable notice and review procedures set forth in paragraph (1) of this subdivision. No placement of a school-age child in a State-supported school may be terminated prior to review by the committee on special education. No appointment to a State-operated or State-supported school shall be terminated until the pupil can be transferred to a more appropriate program without interruption of the continuity of such pupil's education program.

(6) The eligibility of deaf infants to receive educational services pursuant to section 4204-a of the Education Law, and the approval of educational facilities to provide such services, shall be determined in accordance with the provisions of this paragraph.

(i) For the purposes of this paragraph:

(a) *Deaf infant* means a child of less than three years of age who has a severe hearing loss which precludes the learning of spoken language through the sense of hearing alone. Infants who are unable to respond to sounds presented at intensities of 60 decibels (db) sound pressure level (SPL) shall be eligible for special educational assistance in order to develop spoken language. Infants of less than two years of age who are unable to respond at 60 decibels (db) sound pressure level (SPL) may be eligible for such services, provided that they have been recommended by a diagnostic agency.

(b) *Approved facilities* means the schools for the deaf which are enumerated in section 4201 of the Education Law, and other public and private agencies which have been approved by the commissioner in accordance with the provisions of subparagraph (iii) of this paragraph.

(ii) Eligibility of infant. An annual application for services shall be filed by the parents or legal guardians of deaf infants on forms prescribed by the commissioner. The initial application for each infant shall be accompanied by audiological, otological and other appropriate reports which will be used in determining eligibility for program assistance. If an infant is determined to be eligible, a referral will be made to an approved facility by the commissioner. Continuation in the program shall be dependent upon infant progress reports which shall be submitted quarterly by the facility which each infant attends. If a facility indicates that an infant cannot benefit

from the educational program to which such infant has been admitted, the facility shall forward to the commissioner its recommendations for termination of the infant's participation in such program and for any appropriate educational services for such infant.

(iii) Eligibility of facilities. A facility shall be approved to provide educational services to such infants on an annual basis, following an inspection of such facility, provided that the plant, staff and program thereof meet the following standards:

(*a*) The facility shall provide an educational program, for both infant and parent or legal guardian, which shall include language development, auditory stimulation, speech and speech reading. Language development may include any system of oral or manual communication or combination of both. Such program shall also provide orientation to parents regarding the implications of deafness, developmental needs of deaf infants, and the psychosocial problems encountered by parents or legal guardians of deaf infants.

(*b*) An approved facility shall have a physical plant appropriately equipped to serve infants who are deaf, and shall be subject to a site visitation by the commissioner.

(*c*) An approved facility shall adhere to all provisions of paragraph (7) of subdivision (b) of this section.

(*d*) An approved facility shall employ teachers of the deaf or teachers of the speech and hearing-handicapped who are certified or licensed pursuant to section 80.6 or 80.2(j) of this Title.

(*e*) A register of approved facilities will be maintained by the department.

(e) *Notice of closing, transfer of ownership or voluntary termination of approval by approved private schools.* The owner or operator of an approved private residential or nonresidential school for pupils with handicapping conditions that receives public funds pursuant to articles 81 and/or 89 of the Education Law, who intends to cease the operation of such school or chooses to transfer ownership, possession or operation of the premises and facilities of such school or to voluntarily terminate its status as an approved school, shall submit to the commissioner written notice of such intention not less than 90 days prior to the intended effective date of such action. Such notice shall set forth a detailed plan which makes provision for the safe and orderly transfer of each student with a handicapping condition who was publicly placed in such approved private school. The owner or operator of any such approved private school shall not cease to provide services to any student with a handicapping condition until the required notice and plan have been received, reviewed and approved by the commissioner, and a transfer of such student has been arranged in accordance with the approved plan.

Historical Note

Sec. filed July 1, 1974; repealed, new filed: Nov. 1, 1976; Dec. 21, 1976, renum. 200-1.7, filed May 1, 1981; new added by renum. and amd. 200-2.7, filed March 31, 1982; amds. filed: May 1, 1984; Nov. 2, 1984; April 30, 1985; June 25, 1985; Jan. 27, 1986; Feb. 24, 1986; Jan. 22, 1987; June 25, 1987; Sept. 22, 1987 as emergency measure; Nov. 20, 1987 as emergency measure eff. Nov. 20, 1987; made permanent by order filed Nov. 24, 1987 eff. Dec. 9, 1987. Amended (d)(1)(i), (2)(i)-(iv), (5). Amd. filed Nov. 24, 1987 eff. Jan. 8, 1988. Added (e).

200.8 State assistance for instruction of pupils with handicapping conditions pursuant to section 4406 of the Education Law. (a) *Approval of orders of the Family Court.* An order of the Family Court which directs that special educational services be provided to a pupil with a handicapping condition may be approved by the commissioner, provided that satisfactory evidence is submitted to establish that:

(1) for services provided during the months of July and August through August 1987, such pupil is a child with a handicapping condition, as defined by section 4401 of the